APPENDIX

APPENDIX A

IN THE CIRCUIT COURT FOR THE TENTH
JUDICIAL CIRCUIT OF ALABAMA
EQUITY DIVISION

Case No. 172-491

PREMIER INDUSTRIAL CORPORATION, a corporation
Complainant

v.

ROY A. MARLOW AND C & C PRODUCTS, INC., a corporation
Respondents

AMENDED BILL OF COMPLAINT

Comes Premier Industrial Corporation, a corporation Complainant in this cause and amends the Bill of Complaint heretofore filed by substituting the following therefor:

1. Premier is incorporated under the laws of the state of Ohio. Premier is a diversified company in interstate commerce doing business in each of the United States.

2. The respondent, Roy A. Marlow, ("Marlow") is a resident of Jefferson County, Alabama, and is over the age of 21 years.

3. The respondent, C & C Products, Inc., a corporation, ("C & C") is a corporation organized and existing under the laws of the state of Ohio, qualified to do business in the state of Alabama and with its southeastern division office located in the city of Birmingham, Alabama.

4. Complainant has for many years engaged in the business of designing, developing, distributing and selling in interstate commerce products used in the maintenance of vehicles, equipment, plants and buildings, and complainant sells its products to a great variety of customers throughout the United States.

5. Complainant has expended large sums of money in selecting, developing and marketing its products, advertising and promoting its same and various brand names and trademarks which it uses, in training and supervising its sales representatives and management personnel and providing unique assistance to its customers by supplying them with quality parts and supplies, developing sources of supply for customer needs and educating such customers in efficient methods of storage and inventory control for such parts and supplies.

6. Complainant markets its products through independent sales agents who are assigned to specific marketing territories and who are carefully and exactingly selected, trained and equipped to provide quality sales and service which is recognized among all of the customers of potential customers for the parts and supplies developed and marketed by complainant. Most of the direct contact with customers is made by such sales agents, and valuable good will is generated by such agents on behalf of and in the benefit of complainant and its products.

7. Complainant reserves the right to refuse or accept all orders obtained by the independent sales agents and is not bound to accept any order obtained by any independent sales agent. Orders are not shipped to the independent sales agents but are shipped directly to the customer. The independent sales agents are prohibited from using the trade name of complainant except in connection with the sale of products shipped by the complainant to the customer purchasing such products. Further, the independent sales agents have no authority to assume or create any obligation whatever, express or implied, in behalf of or in the name of the complainant or to bind the complainant in any manner whatsoever. All of the expenses for the operation of the independent sales agent's office and activities are borne by the independent sales agents and they are solely responsible for the payment thereof. No products of the complainant

are stored in Alabama but are shipped into the state in response to orders approved by the complainant.

8. The independent sales agents are not paid on a sales basis but on commissions only and based solely on the merchandise which he sells. The independent sales agents are responsible for all travel and other expenses, conduct of the business and complainant has no responsibility for these items. Complainant does not require or allow independent sales agents to make collections for the company and the independent sales agents are prohibited from endorsing any commercial paper belonging to complainant or to carry any bank accounts in any kind of nature in complainant's name. Complainant does not require the independent sales agents to provide any services to the customers and no written report are required other than a record of calls and sales.

9. As a result of the extensive training given such sales agents and management employees, and the many years during which complainant held out such sales agents and management employees to complainant's customers, the aaid sales agents and management employees have become identified with complainant's business and profited by association with the good will and successful image of complainant so that such sales agents and management employees have exceptional access to complainant's customers.

10. The respondent C & C was organized by Leo M. Chaplin and his son, Lee J. Chaplin, both residents of Cleveland, Ohio, in April of 1966. Leo M. Chaplin owns 47-½% of the stock of C & C and is the president of that company. Lee J. Chaplin owns 47-½% of the stock of C & C and is the vice president of that company. The other officer is Mrs. Leo M. Chaplin, the secretary of that company. C & C is a competitor of complainant. C & C uses the same marketing techniques as complainant and sells the same type of products as complainant.

11. Leo M. Chaplin was associated with or employed by complainant from December of 1951 until February of 1965. He became an independent sales agent for complainant in December 1951 and received training from complainant. At this time Leo M. Chaplin signed an independent sales agreement with complainant including an agreement not to compete for a period of two years after the termination of his association with complainant. In January or February of 1954, Leo M. Chaplin was promoted to a regional manager on a full time employment basis with complainant responsible for independent agents of complainant in a large area of the eastern United States. In July of 1955, Leo M. Chaplin was promoted to a staff position at the home office in Cleveland. In 1956 he was promoted to division manager for the eastern half of the United States with responsibility for 7 regional managers and a large number of independent agents. In 1957 he was promoted to field sales manager for a division of complainant with responsibility for the entire United States. In 1959 Leo M. Chaplin was promoted to research and development of a new division of complainant. In 1962 Leo M. Chaplin was promoted to vice president of complainant. In 1965 he voluntarily left the employ of complainant. During the entire time of his association and employment by complainant, Leo M. Chaplin was responsible for the recruitment of independent agents, the development of complainant's sales force and was well acquainted with the marketing techniques, trade secrets and other confidential information, including customer lists, of complainant.

12. Lee J. Chaplin was first employed by complainant in January of 1958 as an independent agent. Upon his employment he signed an independent agent agreement with complainant including a provision against competition with complainant for two years following termination of his association with complainant. In 1960 Lee J. Chaplin was promoted to product planning coordinator in the home office of complainant. In 1962 Lee J. Chaplin was pro-

moted to district manager responsible for the sales of complainant in the state of Pennsylvania and a part of the state of New York. He remained in this position until 1964 when he voluntarily left complainant. During his service as district manager for complainant, he was responsible for sales of complainant in his district with the responsibility for recruiting and training new agents.

13. Leo M. Chaplin and Lee J. Chaplin knew that complainant's sales agents and management employees were parties to contracts with complainant which provided, in substance, that such sales agents and management employees:

(a) Will keep in strict confidence and will not make known, divulge, reveal, furnish, make available, or use (other than in the regular course of business) during the term of the contract or thereafter, any trade secrets or confidential information of the complainant gained during his association with complainant. including complainant's unique selling methods and trade techniques, sales catalogs, order books, promotional and institutional materials, customers lists and other selling information;

(b) That such sales agents and management employees will not for a two-year period following termination of their contracts, in the territory assigned to them at termination or during the last year prior to termination, compete with the company by soliciting, diverting, enticing or taking away the customers for complainant's products in such territory; or promote or assist financially or otherwise any person, firm, association or corporation engaged in any business which competes with complainant in such territory.

14. In, to-wit, March of 1965, Leo M. Chaplin and Lee J. Chaplin associated with one Baker to form an Ohio corporation known as Baker Alloy Fastner. This company sold the same type of products as complainant and competed with complainant. Baker had previously been

employed by complainant and had been injoined from competing with complainant, which both Chaplins knew at the time of their association with Baker. During the Chaplins association with Baker Alloy Fastner they employed several of complainant's agents knowing that the said agents were employed by complainant, knowing that they had non-competition agreements with complainant and knowing that they would be selling the same products for Baker Alloy in the same territory in which they were then selling for complainant. The Chaplins were also aware that complainant has instituted law suits against some of the said agents formerly employed and competent courts had injoined some of those agents. In 1966 Leo M. Chaplin and Lee J. Chaplin left Baker Alloy Fastner and formed C & C as aforesaid.

15. Notwithstanding said Leo M. Chaplin and Lee J. Chaplin's knowledge of the contractual provisions recited above, and of the actions of the courts enforcing such provisions, said Leo M. Chaplin and Lee J. Chaplin, on behalf of C & C, have solicited and induced and attempted to induce sales agents and management employees of complainant to terminate their representation and/or employment with complainant to become sales agent and/or employees of C & C, and said Leo M. Chaplin and Lee J. Chaplin are continuing in such conduct, and unless stopped by Order of this Court, will continue to attempt to induce and solicit complainant's sales agents and management employees to terminate their representation and/or employment with complainant and become sales agents and/or employees of C & C in violation of non-competition agreements with complainant.

16. The respondent Marlow was employed by one of the divisions of complainant as an independent agent on July 30, 1956. Thereafter on October 31, 1958, the respondent Marlow was promoted to territory supervisor of complainant; on May 18, 1960, to regional manager; and on

January 24, 1969, to district manager. From the time that he was made territory supervisor for complainant he was responsible for the sales force of independent agents in an ever increasing territory. He was further responsible for the recruitment of additional independent agents. In the course of such recruitment he was required to explain the independent agent agreement to the said recruits, including a non-competition agreement for a period of two years following termination with complainant and to obtain their signatures thereon. During the period of time that respondent Marlow was associated with and employed by complainant in positions of ever increasing responsibility, he was made privy to the trade secrets and confidential information of complainant.

17. During the week of October 11, 1971, contact was established between the respondent Marlow and Leo M. Chaplin or Lee J. Chaplin, acting for and on behalf of the respondent C & C. This contract was with regard to the respondent Marlow leaving the employ of complainant and beginning employment with C & C. Thereafter, at some time prior to November 1, 1971, respondent Marlow and Leo M. Chaplin or Lee J. Chaplin, acting for and on behalf of C & C, agreed that the respondent Marlow would immediately begin working on behalf of C & C and would eventually leave complainant and become a full-time employee of C & C.

18. Complainant avers that an unlawful conspiracy was formed between Marlow and C & C whereby Marlow would continue to represent himself as district manager for complainant while assisting C & C to secure the services of the independent agents of complainant. Thereafter, the respondent Marlow continued to represent to complainant that he was acting as its district manager responsible for the supervision and direction of the independent agents listed in Exhibit "B" attached hereto and made a part hereof as it fully set out herein. From on or about November 1, 1971, until February 29, 1972, however, the respondent Marlow

was actually working on behalf of C & C as a part of the aforesaid unlawful conspiracy to accomplish the following:

(a) To recruit independent agents of complainant to work for and on behalf of C & C under the direction of Marlow who was to occupy essentially the same position with C & C that he then occupied with complainant.

(b) To introduce Leo M. Chaplin or Lee J. Chaplin, acting for and on behalf of C & C, to the independent agents of complainant under the supervision of Marlow for the purpose of showing the said agents the C & C product line and inducing or attempting to induce the said agents to breach the said contracts with complainant and begin work for C & C.

19. Complainant further avers that during the said period November 1, 1971, to February 29, 1972, in pursuance of the aforesaid unlawful conspiracy the respondents, separately and severally, approached and attempted to wrongfully and maliciously interfere with the existing business relationship between complainant and certain of its independent sales agents. The names of the independent sales agents so approached in pursuance of the aforesaid conspiracy are as follows:

(a) Robert L. Hutcherson, Jr.

(b) S. Forest Baker

(c) George Max Sides

(d) Robert C. McMillan

(e) Verdery A. Clark

(f) James Fuller

(g) Richard Corley

(h) Carlton Abernathy

20. Complainant further avers that as a result of the aforesaid unlawful activities of respondents, orders were procured from several of the aforesaid independent sales

agents of complainant and the following independent sales agents, as a result of the aforesaid unlawful activities of respondents, terminated their association with complainant and in violation of their aforesaid contracts with complainant worked for and on behalf of respondents in competition with complainant:

(a) S. Forest Baker

(b) George Max Sides

(c) Robert C. McMillan

(d) Verdery A. Clark

21. Robert C. McMillan has now left the employment of respondents and the United States District Court for the Southern District of Mississippi has enjoined the said George Max Sides from continuing in the employment of respondents.

22. Complainant avers that the respondent Marlow fraudulently and deceitfully represent to complainant that did from November 1, 1971, until February 29, 1972, he was working for the complainant while actually working for respondents against the interests of complainant. Complainant avers that the respondent Marlow fraudulently and deceitfully accepted salary and travel expenses from complainant while actually working for its competitor C & C against the interests of complainant. Complainant avers that the respondent Marlow fraudulently, deceitfully and maliciously used his position as a supervisor for complainant to influence the said independent agents of complainant to breach said contracts with complainant.

23. Complainant avers that the said Leo M. Chaplin and Lee J. Chaplin have for several years prior hereto engaged in the practice of attempting to wrongfully, unlawfully and maliciously interfere with the business relationship between complainant and many of its independent agents. Complainant further avers that at least during

the period November 1, 1971, until the present time the said Leo M. Chaplin and Lee J. Chaplin, acting for and on behalf of the respondent C & C, have engaged in the practice of wrongfully, unlawfully and maliciously interfering with the business relationship between Premier and many of its independent agents and toward this end formed a conspiracy with the respondent Marlow as aforesaid.

24. Complainant avers that as a result of said fraudulent, deceitful, malicious and unlawful activities of the respondents, several of the independent agents of complainant named in paragraph 20 hereof have been caused to breach their said contracts with complainant and to sell for C & C the same type products they previously sold for complainant in the same territories in which they previously acted for complainant in violation of their said contracts with complainant, copies of which are attached hereto as Exhibit "C" and made a part hereof as it fully set out herein.

25. The respondent Marlow is now employed by C & C in a supervisory capacity with responsibility for C & C's sales agents and in that capacity is utilizing the aforesaid former independent agents of complainant in breach of said agents' contracts with complainant.

26. Complainant avers that it has suffered great and irreparable harm and damage in the past and will continue to suffer great and irreparable harm and damage in the future if the aforesaid activities of the respondents are allowed to continue.

27. Complainant avers that it is without a full, adequate and complete remedy at law.

WHEREFORE, PREMISES CONSIDERED, complainant prays:

1. That the said Roy A. Marlow and C & C be made parties respondent to this Amended Bill of Complaint and that proper process be issued to them and served upon them as provided by law and that they be required to plead,

answer or demur to said Amended Bill of Complaint within the time required by law.

2. That this Court, pending the hearing of said suit on its merits, and upon consideration of this sworn Amended Bill of Complaint and supporting affidavit, will grant and forthwith order the Register to issue a temporary writ of injunction, restraining order or other appropriate writ enjoining or restraining respondents from:

(a) Soliciting, attempting to solicit, or inducing, procuring, attempting to induce or attempting to procure further breaches of contract between complainant and any of its sales agents and/or management personnel.

(b) From continuing to employ or attempting to employ or attempting to employ former sales agents or management personnel of complainant in the same territory in which they previously worked for complainant for the purpose of selling the type products they formerly sold for complainant for a period of two years after their termination with complainant, specifically: S. Forest Barker and Verdery A. Clark.

(c) From accepting or filling any sales or orders obtained by or submitted by S. Forest Barker and Verdery A. Clark, for the same type products they formerly sold for complainant from the same territory in which they formerly sold for complainant for a period of two years following their termination with complainant.

3. That upon a final hearing of this cause this Court will enter an order permanently enjoining the respondents from those activities enjoined in the temporary injunction.

4. That respondents be ordered and directed by this Court to discover and account to complainant for all contracts, orders or other means, of any kind or nature whatsoever, by which sales of respondents have been consummated and the profits obtained thereon as a result, in whole or in

part, of the unlawful and fraudulent activities of the respondents as set forth herein.

5. That upon a final hearing of this cause the Court award judgment in favor of complainant against respondents in the sum of $500,000.00 as compensatory damages and $500,000.00 as punitive damages, together with its costs incurred in this action.

6. That this Court grant such other, further or different relief as the facts in the opinion of the Court may warrant.

7. This complainant offers to do equity for which it will ever pray.

RIVES, PETERSON, PETTUS, CONWAY & BURGE

/s/ By W. EUGENE RUTLEDGE
W. Eugene Rutledge
Solicitor for Complainant

/s/ Solicitor for Complainant

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISON

CIVIL ACTION NO. 72J-99

PREMIER INDUSTRIAL CORPORATION, *Plaintiff*

v.

GEORGE M. SIDES, *Defendant*

Premier Industrial Corporation of Cleveland, Ohio is among other things a distributor of maintenance products. There are approximately 89,000 items in its catalog of maintenance products. The defendant was hired in 1966 by Premier as a salesman in Mississippi. It was the defendant's duty as salesman to take orders and transmit such orders to Atlanta, Georgia for acceptance and filling and billing. The defendant was not hired for any particular period of time but was hired strictly on a commission basis. The written contract under which the defendant was hired contained a prohibition against engaging in any business or activity in competition with the plaintiff in thirty-two counties in Mississippi. The defendant in February 1972 accepted employment as a salesman for a competitor in all eighty-two counties in Mississippi. Premier has several divisions in its business including divisions which sell fasteners, auto replacements, lubricants and aerosol sprays of all kinds. The defendant was last hired to take orders for maintenance products in Mississippi.

The first question presented to the Court is as to whether or not the plaintiff as an Ohio corporation has any right to institute and maintain this suit in this Court. It never qualified to do business in Mississippi at any time as required by the laws of Mississippi. Premier never had an of-

fice in Mississippi. It never had a telephone in Mississippi. It conducted its business in interstate commerce through the sale of its merchandise and orders taken in Mississippi and transmitted to and accepted in Atlanta, Georgia. Premier authorized its salesman to furnish its customers bins for the accommodation of its bolts and nuts, etc. On some occasions the salesman would be in Atlanta, and would pick up an order and bring it to the customer in Mississippi. That has happened many times for the accommodation of the customer. The salesman was required as a part of his duty to collect delinquent accounts in Mississippi on his sales and if they were not collected, his commission was charged back to him. On occasions, the salesman had been required to collect accounts in Mississippi which he did not sell. The salesman has sold articles in interstate commerce on order to public agencies such as counties and schools which the salesman has been required to qualify by procuring a special license to make such sales and to recover therefor. These sales in my opinion did not constitute doing business in Mississippi. This Mississippi statute denying access to its courts is highly penal and must be strictly construed.[1] The Court heard testimony on the question as to whether or not plaintiff was doing business in Mississippi without having qualified to do so and under penalty of statute. The Court is of the opinion and finds that Premier has not done business in Mississippi in contravention of the statute, but has in such respect and under the circumstances in this case engaged

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[1] In *York Manufacturing Company* v. *Colley*, 247 U.S. 21, 38 S.Ct. 430, a Pennsylvania corporation sold an ice manufacturing piece of equipment to a Texas resident. The contract of sales provided for the installation of the equipment in Texas under the supervision of an engineer. The seller was not qualified as a holder of a permit to do business in Texas. The Supreme Court of the United States held that the contract for the installation of the equipment was only incidental to the interstate sale. The state court decision to the contrary was reversed.

only in interstate commerce. Those incidental and isolated instances where its salesmen have accommodated the customers in Mississippi cannot properly be treated and regarded as doing business. This plaintiff had the right to establish its policy as to engaging in business through the channels of interstate commerce, and nothing has been shown the Court to change that policy, or to entitle anyone to invoke this highly penal statute under the contention that the plaintiff was engaged in intrastate commerce.

The next question is as to the proper application under the circumstances of the covenant in the contract of employment which denies the salesman the right to engage in like employment in competition with Premier for two years after termination of his employment. This requirement would have application only in the thirty-two counties mentioned in the contract.

The salesman contends that the products which he is selling for his new employer in Mississippi are not competitive with the products of like kind being offered for sale by Premier because: The tensile strength of the bolts now sold are far superior to those of Premier; and because the price charged for their products is only a fraction of that being charged by Premier therefor. It is the view of this Court that such considerations do not provide proper questions for determination by the Court in such case. The contract expressly provides that it is controlled by the laws of the state of Ohio where Premier has its business.[2] As a matter of general law, it does not appear

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[2] In *Castleman* v. *Canal Bank & Trust Co.*, 156 So. (Miss.) 648, 649, the Supreme Court of Mississippi said: "We regard it as the settled law that, when a substantial portion of a transaction has been had and is to be had in one state and a substantial portion in another, the parties may by express terms agree as to which of the laws of the two states are to govern in respect to the obligations of that contract." Cf: *Edna Talley English* v. *Insurance Company of North America*, 270 F.Supp. 713 (opinion by Judge Clayton); *Ideal Structures Corporation* v. *Levine Huntsville Development Corporation*, (5CA) 396 F.2d 917, 922-923.

to be unreasonable or excessive in its requirements which are made applicable in only thirty-two counties of the state and then for only a period of two years after termination of employment.[3]

The defendant is a married man with a family. All of his adult life has been spent as a salesman. The Court is required in such case before granting injunctive relief to consider the counterveiling impact of such relief against the benefit from the process. The contract makes express reference to the catalog of Premier which contains some 89,000 maintenance products. It may be conceded that the capscrews now being sold for the defendant's present employer have a greater tensile strength and are cheaper than those being offered by Premier. But the contract between these competent parties make no provision for any exception and does not undertake to define competition except in general terms. It is not the province of this Court to make a contract between these parties, or to criticize the advisability of any provision in the contract, but simply to enforce the contract as written between these competent parties. This provision is not an unfamiliar provision in a contract of this kind. It must be meaningful and effectively applied to meet the needs and requirements of these competent parties, and their intention and purpose in making such a provision in this contract of employment. It is of no consequence that the contract in suit is printed and embodies only terms and conditions inserted therein

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[3] In these contracts containing clauses not to compete, in Mississippi it is recognized that there is such a thing as unfair competition by an ex-employee as well as unreasonable oppression by an employer. The question in such case is as to reasonableness. In *Barbara Donahoe* v. *Rudy D. Tatum*, 134 So.2d 442, the Court said: "In short, the evidence must show the reasonableness of the restriction with respect to the nature of the employment, the duration of the period of restraint, and the scope and extent of the restriction, territorially." Cf: *Wilson* v. *Gamble*, 177 So. (Miss.) 363.

by plaintiff. The contract was made between competent parties for a valuable consideration, and contains and embodies the principle of mutuality. This contract served these parties without criticism from anybody for approximately six years. In the meantime, the defendant, who is a very personable individual, made friends and formed contacts as a salesman for Premier which he is not privileged under the important terms of the contract to use for the advantage of a competitor. It was exactly this kind of situation which the contract solemnly provided should not occur or be allowed to exist. The defendant is in the employ of a competitor composed of former officials of Premier, and are engaged in selling and offering for sale exactly the same class of merchandise sold by defendant for Premier. It is unthinkable that a protective clause of this kind could be nullified at the whim and caprice of a salesman on such slight justification as is sought to be done in this case. This identical contract has been approved by this Circuit and there is no fact or circumstance in this record to authorize or justify any departure from that decision.[4] It is no answer to a suit for injunction that the evidence as to the extent of the prospective injury is uncertain or doubtful, and that it will be impossible to assess damages with any degree of mathematical exacti-

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[4] In *Premier Industrial Corporation* v. *Texas Industrial Fastener Company*, (5CA) 450 F.2d 444, the Court had before it the contract of employment by Premier of a salesman in a given territory containing a non-competing clause for two years, and providing for its construction and enforcement under the laws of Ohio where it was made. The law of Ohio looks at one of these contracts exactly as does the law of Mississippi to determine its reasonableness as to scope and range. That decision is determinative of the questions here as to the validity and effect of this contract. The contract at bar involves only thirty two of the eighty-two counties in Mississippi. The defendant in this case solicited business and performed as a salesman in this territory for approximately six years before ceasing to do business with Premier on February 25, 1972.

tude. Those facts and circumstances present a classic instance of irreparable damages.[5]

It is the opinion of this Court that such provision in the contract is valid and enforceable and should be applied in this case. The plaintiff is entitled to an injunction to restrain the defendant from engaging in any business, or sales in direct, or indirect competition with the plaintiff in anyone of the named thirty-two counties in Mississippi exactly as the contract provides. This case was submitted to the Court for decision on its merits on application for permanent injunction. Accordingly, no necessity for a bond exists.

In sum, Premier Industrial Corporation, as an Ohio Corporation, has never engaged in business in Mississippi, and has done nothing in Mississippi in its business to disentitle it to access to this Court in this case. The contract of employment between the parties in this suit is valid and enforceable under the laws of the state of Ohio. The contract provision not to compete in thirty-two counties in Mississippi for two years after date of the judgment in this case is fair and reasonable and enforceable. The defendant has been a salesman all of his adult life, but there is nothing before the Court to show the unreasonableness of such requirement under the facts and circumstances here. Accordingly, there will be issued a permanent injunction against the defendant from competing in any manner, di-

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[5] In *Pitts* v. *Carothers, et al*, 120 So. (Miss.) 830 the Court held: "An injury is irreparable when it cannot adequately be compensated in damages or where there exists no certain pecuniary standard for the measurement of the damages. Where the extent of the prospective injury is uncertain or doubtful so that it is impossible to ascertain the measure of just reparation, the injury is irreparable in a legal sense, so that an injunction will be granted to prevent such an injury. To render an injury irreparable it is not necessary that the pecuniary damage be shown to be great, but, on the contrary, the fact that in an action at law the jury could award only nominal damages often furnishes the very best reason for interference by a court of equity by injunction."

rectly or indirectly, with the Premier Industrial Corporation in its present business in anyone of the thirty-two counties in Mississippi mentioned in said contract of employment in suit. No bond need be executed for such process since the Court has heard evidence thereon in furtherance of an application by the parties for a permanent injunction. The defendant will be assessed with all costs of this proceeding.

A judgment accordingly may be presented for entry within five days after this date.

/s/ United States District Judge

December 22, 1972

APPENDIX C

Title 10, Section 21 (89) Code of Alabama, 1940, Recompiled 1958

§ 21 (89). Foreign corporations not qualified to do business in state; effect on certain contracts or agreements; service on.—All contracts or agreements made or entered into in this state by foreign corporations which have not qualified to do business in this state shall be held void at the suit of such foreign corporation or any person claiming through or under such foreign corporation by virtue of said void contract or agreement; but nothing herein shall abrogate the equitable rule that he who seeks equity must do equity; and provided, however, that the failure of a foreign corporation to qualify to do business in this state shall not impair the validity of any contract or agreement heretofore or hereafter entered into and consisting of a mortgage upon real property or an interest in real property in this state, and the note secured thereby, where the mortgage is insured by the Federal Housing Administration or

Title 79, Section 3-247, Code of Mississippi 1972

No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this state.

A foreign corporation which transacts business in this state without a certificate of authority shall be liable to this state, for the years or parts thereof during which it transacted busi-

guaranteed by the Veterans Administration, if said foreign corporation shall have thereafter qualified to do business in this state. In all suits against such foreign corporation or against any person claiming under such foreign corporation by virtue of such void contract, the foreign corporation or such person claiming under it shall be held to be estopped from setting up the fact that the contract or agreement was so made in violation of law. In all actions against foreign corporations who have not qualified to do business in this state as provided by law, the summons or other process may be served upon the officer, agent or employee of the foreign corporation who acted for or represented such foreign corporation in making the contract or agreement sued upon. (1959, p. 1099, § 89, appvd. Nov. 13, 1959; 1970, Ex. Sess., p. 2658, appvd. March 4, 1970.)

ness in this state without a certificate of authority, in an amount equal to all fees which would have been imposed by this chapter upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this chapter and thereafter filed all reports required by this chapter, plus all penalties imposed by this chapter for failure to pay such fees. The attorney general shall bring proceedings to recover all amounts due this state under the provisions of this section SOURCES: Codes, 1942, § 5309-239; Laws, 1962, ch. 235, § 124, eff from and after January 1, 1963.

Title 9, Section 22, Code of Alabama, 1940, Recompiled 1958

§ 22. (6826) Contract in restraint of trade, void.—Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is providing by the next two sections, is to that extent, void.

SUPREME COURT, U. S.

SEP 24 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-299

PREMIER INDUSTRIAL CORPORATION, a corporation,
Petitioner

v.

ROY A. MARLOW and C & C PRODUCTS, INC., a corporation,
Respondents

SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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PREMIER INDUSTRIAL CORPORATION, a corporation,
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THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1973-74

PREMIER INDUSTRIAL CORPORATION, a Corporation

v.

ROY A. MARLOW, ET AL.

S.C. 502

Appeal from Jefferson Circuit Court

OPINION

MERRILL, JUSTICE.

This appeal is from orders sustaining demurrers of Roy A. Marlow and C & C Products, Inc., to the amended bill of Premier Industrial Corporation and dismissing the bill.

This is the second appeal in this cause. The contents of the original bill, as amended, are set out in the opinion on first appeal and will not be repeated here. It is sufficient to say that Premier sought to enforce non-competing contracts with Marlow and Leo and Lee Chaplin, owners of C & C Products, Inc. These contracts had been made with Premier while Marlow and the Chaplins were working for Premier. The trial court granted a preliminary injunction. Marlow and C & C filed demurrers, motions to discharge and dissolve the injunction and filed an answer including the defenses that Premier had not qualified to do business in Alabama, that the bill of complaint sought to enforce non-competition agreements of people who were residents of and working in other states than Alabama; that Premier had previously filed similar suits in Ohio, where the non-competition contracts were made, in South Carolina and Mississippi, and that preliminary injunctions had been denied in South Carolina and Mississippi, and the suit in Ohio had been dismissed on motion of Premier.

In each paragraph of the prayer, Premier asked that the respondents be enjoined from doing certain acts in violation of Premier's contracts with its sales agents. The first appeal was from the order overruling the motions to discharge and dissolve the temporary injunction.

This court held on first appeal, *C & C Products, Inc.* v. *Premier Industrial Corp.*, 290 Ala. 179, 275 So. 2d 124, that "the cause of action stated in the bill must be deemed to arise in contract, and not in tort"; that since Premier had not qualified to do business in Alabama, our courts were not available to it to prosecute its law suits; and that the non-competition contracts which Premier sought to enforce were void and unenforceable under the laws of this state and the unpleaded law of other states. The opinion of this court concluded:

> "It is our conclusion therefore that the Chancellor erred in denying the motions of the appellants to dissolve the preliminary injunction for the reasons above set out.
>
> "Accordingly the orders denying appellants' motions to dissolve the preliminary injunction are hereby reversed and the cause is remanded for entry of orders consonant with this opinion."

The judgment was reversed and the cause remanded with instructions.

On May 11, 1973, Premier filed an amended bill of complaint. On June 8, 1973, C & C filed demurrers, and Marlow filed demurrers and also filed a motion to dismiss on June 20, 1973. On July 23, 1973, the trial court sustained C & C's demurrer and dismissed as to it, and on July 24, Marlow's demurrer was sustained and his motion to dismiss was granted.

Premier contends that this cause was governed by the new Alabama Rules of Civil Procedure because the orders of dismissal occurred after July 3, 1973, the date ARPC

became effective, and on that date demurrers had been abolished, Rule 7(c). We cannot agree.

Here, the bill of complaint had been amended, the demurrers and the motion to dismiss filed, all prior to July 3, 1973, and the only action remaining to be taken was the ruling of the court which came on July 23 and 24.

There is no statement in the record or claim in brief that it was suggested to the trial court that the new rules should apply. Rule 86 ARPC provides:

> "These rules shall take effect six months from the date of their adoption by the Supreme Court of Alabama. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

In this case, it is evident that the "former procedure applies" and that the trial court did not abuse its discretion in applying the former procedure. See *Phillips* v. *D & J Enterprises*,——Ala.——, 288 So. 2d 137.

Premier again argues in brief that "it is not attempting to enforce any contracts. This is a tort action. * * *" This argument was rejected in the opinion on first appeal and on rehearing. We consider that question settled as of that time.

It is also argued that the bill, as amended, on second appeal differs substantially from the one on first appeal. The great majority of the paragraphs are identical. There are some minor variations as shown by the following examples. Paragraph 1 of the original bill alleged: "Premier is a diversified company doing business in each of the United States." The amended bill reads: "Premier is a diversified company in interstate commerce doing

business in each of the United States." In two other paragraphs of the original bill, Premier charged that respondents attempted to "induce" or "procure" a breach of the "contract" or "contracts," while the amended bill charged interference with the "business relationship" between Premier and its agents. We see no legal difference because the business relationships were based upon the contracts sought to be enforced.

The only appreciable difference in the amended bill are paragraphs 7 and 8 of the latter. These two paragraphs contain allegations which are designed to induce a conclusion that Premier is engaged in interstate commerce in Alabama and not in intrastate commerce.

But paragraphs 5 and 6 of the original and the amended bill show that Premier's business in each of the United States includes "selecting, developing and marketing its products, advertising and promoting its name and various brand names and trademarks which it uses, in training and supervising its sales representatives and management personnel and providing unique assistance to its customers by supplying them with quality parts and supplies, developing sources of supply for customer needs and educating such customers in efficient methods of storage and inventory control * * *" and marketing "its products through independent sales agents who are assigned to specific marketing territories and who are carefully and exactingly selected, trained and equipped to provide quality sales and service * * *."

This court, on first appeal, determined from these allegations, that Premier was engaged in intrastate business in Alabama and we see no reason to alter that position on this appeal. That being so, it follows that we reach the same conclusion as we did on first appeal.

Premier argues that paragraphs 7 and 8 of the amended bill show it was engaged in interstate commerce. Assuming

for the sake of argument that this contention has merit, the result is not changed. Paragraphs 7 and 8 do not describe "one who is employed as an agent, servant or employee," Tit. 9, § 23, but described an independent contractor.

If these "independent sales agents" are independent contractors, then the contract is not enforceable in Alabama because it is void. Tit. 9, § 22, Code 1940, provides:

> "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent, void."

The only exceptions in §§ 23 and 24 pertinent here is "one who is employed as an agent, servant, or employee" and if these "independent sales agents" are independent contractors, the contract sought to be enforced is void.

In *Odess* v. *Taylor,* 282 Ala. 389, 211 So. 2d 805, this court, in holding a non-competition contract void in Tit. 9, § 22, stated:

> "For one to be an employee, the other party must retain the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done. Weeks v. C. L. Dickert Lbr. Co., 270 Ala. 713, 121 So. 2d 894."

Paragraphs 7 and 8 do not demonstrate any control of the independent agents. Under the allegations of intrastate or interstate commerce, the end result is the same.

Premier also argues that the bill should not have been dismissed but it should have been permitted to amend.

The original bill was amended before it came up on the first appeal. This court pointed out, among other things, that Premier had not qualified to do business in Alabama. Upon remand, Premier amended again, but did not qualify.

The record before us does not show that any application was made to amend after the trial court sustained the demurrers and dismissed the bill.

In *Caudle* v. *Cotton*, 234 Ala. 126, 173 So. 847, error was claimed because the bill in equity was dismissed without extending to complainant an opportunity to amend, and this court said:

> "* * * there was no error in dismissing the bill, if the demurrer was properly sustained, and no application then made to amend the bill. If it was not at a setting of the equity docket, complainant might have moved to set aside the decree, and to be permitted to amend alleging that it was not at such a session. In that event, it could be shown in the record that it was not so. But the decree recites that it was in term time. We cannot disregard that recital.
>
> "But complainant would fare no better if the presumption were not so indulged, assuming there was a proper hearing. We will, of course, treat as amended, for this purpose, all formal defects. Wood v. Burns, 222 Ala. 650, 133 So. 696; Dothan Oil Mill Co. v. Espy, 220 Ala. 605, 127 So. 178; Lake v. Sealy, 231 Ala 466, 165 So. 399. But if a bill does not in any respect show an equitable right, it is not error to dismiss it ex mero motu, without provision for amendment. Elmore County v. Tallapoosa County, 222 Ala. 147, 131 So. 552; Birmingham Interurban Taxicab Service Corporation v. McLendon, 210 Ala. 525, 98 So. 578; Dailey v. Koepple, 164 Ala. 317, 51 So. 348."

In *Alabama Lime & Stone Co.* v. *Adams*, 222 Ala. 538, 133 So. 580, this court said:

> "* * * The court is not willing to hold that a party complainant may by repeated amendments keep his case perpetually in court. * * * Appellant amended its bill without improving it * * * and the court was not bound to assume that further opportunity to amend would have produced a different result. There was, therefore, no error in dismissing the bill."

At no time has it been shown that Premier has qualified to do business in Alabama, and two appeals are a sufficient burden on the courts of this state to pursue its contract claims. Under the last two quoted cases, the trial court did not err in dismissing the bill.

AFFIRMED.

Heflin, C. J., Harwood, Maddox and Faulkner, JJ., concur.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: SC 502

PREMIER INDUSTRIAL CORP., A CORP., *Appellant*

v.

ROY A. HARLOW AND C & C PRODUCTS, INC., A CORP., *Appellee*

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

——| Petition for Writ of Certiorari denied. No opinion.

——| Submitted on briefs

——| Appellant granted additional time to file transcript of record to and including

XX | Application for rehearing overruled. No opinion.

——| Appell———granted 15 additional days to file briefs to and including

——| Appell———granted 15 additional days to file reply briefs to and including

——| Transcript filed (Notice under Rule 12)

——| Permission to file amicus curiae briefs granted

——| Permission to make additional assignments of error granted.

——|

/s/ J. O. SENTELL
J. O. Sentell
Clerk, Supreme Court of
Alabama

June 20, 1974

Certificate of Service

I, W. Eugene Rutledge, counsel for petitioner and a member of the Bar of the Supreme Court of the United States, certify that I have served a copy of the foregoing Supplemental Appendix to the Petition for a Writ of Certiorari on Messrs. Cabaniss, Johnston, Gardner, Dumas & O'Neal, 1900 First National-Southern Natural Building, Birmingham, Alabama 35203 and Messrs. Bainbridge and Mims, 1010 Massey Building, Birmingham, Alabama 35203, attorneys for respondents, by depositing the same in a United States post office, with first class postage prepaid, addressed to them at the above address, the 24th day of September, 1974.

W. Eugene Rutledge
Of Counsel for Petitioner